No. 87-2115

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

BEVERLY J. BAIRD AND JERRY BAIRD, - - - - **Petitioners,**

versus

CHARLES J. BOHLE, M.D. AND GYNECOLOGY ASSOCIATES, P.S.C., - **Respondents.**

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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19pps

QUESTION PRESENTED

Was the Sixth Circuit Court of Appeals in error because that Court affirmed the Trial Court's *admission of expert opinion testimony* that Dr. Bohle's accidental cutting of Mrs. Baird's ureter during an operation to remove Mrs. Baird's ovaries did not constitute a violation of acceptable medical standards *when the medical records show that the one to one and a half inch of ureter where the accidental cut was made was lost in "dense fibrous tissue that binds it securely to the upper portions of the ovary"* which Dr. Bohle appropriately and successfully removed to the betterment of Mrs. Baird's health?

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COUNTERSTATEMENT OF THE CASE.

The main controversies between the Petitioners and the Respondents in this case involve issues of fact and inferences therefrom rather than questions of law. Therefore, Respondents will attempt to make a statement of the case which will contain a sufficient summary of the evidence to enable the Court to better evaluate the contentions of the parties with respect to the application of the law by the District Court of the United States for the Western District of Kentucky which tried the case and by the United States Court of Appeals for the Sixth Circuit which affirmed the District Court's judgment.

The Hospital Records.

In their Petition for Certiorari, Petitioners make no statement of the contents of the Hospital Records covering the removal of Mrs. Baird's ovaries during which Mrs. Baird's ureter was injured except to point out that Dr. Bohle did not mention the ureter in his operative "note" (designated in the Hospital Records as "Report of Operation"). Yet, despite their failure to inform the Court of the contents of the Hospital Records, Petitioners contend that the Hospital Records contain nothing to support the opinions of the three physicians who testified that Dr. Bohle, in their respective opinions, had not departed from acceptable medical standards in his operation on Mrs. Baird for the removal of her ovaries.

The Report of Operation by Dr. Bohle states that (Plaintiff's Exhibit #6, TR 1-165-166):

> "PROCEDURE: The patient prepped and draped in the usual fashion with general anesthesia. Pfannenstiel incision thru her old scar, subcutaneous tissue and fascia. Midline incision thru the peritoneum. *The pelvis was a mass of adhesions with omentum being adherent to the anterior abdominal wall and the bladder. Bowel is adherent to the left ovary and bladder and ovaries were adherent to the lateral pelvic walls. Adhesions were all freed up and bleeders were tied. A partial omentectomy was done. Bilateral oophorectomy done.* The infundibulopelvic ligaments being doubly ligated on each side and the pelvis carefully reperitonealized with a continuous 2-0 vicryl suture.

> The abdomen then closed in layers with continuous 2-0 vicryl to the peritoneum, interrupted and continuous O PDS to the fascia. Continuous 2-0 vicryl to the sub-Q, 4-0 vicryl subcuticular stitch. The instrument and sponge counts correct. The patient tolerated the procedure well and left the OR in good condition."

The Report of Operation by Dr. Bohle was dictated and also transcribed on June 28, 1984 which was the date of the operation. Dr. Bohle said nothing about the ureter in the Report because, at that time, there was no indication that the ureter had been injured. The Report indicates, however, that Dr. Bohle was aware of the "mass of adhesions" and the resulting relationship of various body organs.

The ureter is 15 to 18 inches long with a circumference about the size of the lead in a pencil. It was aptly described by counsel for Petitioners in his opening statement to the jury, as follows: "I got a little bitty straw here, ureter is probably not exactly like this, but it's a little bitty tube that runs from the kidney to the bladder draining the urine on both sides, a little small tube that runs down this one on this side, this one on this side" (TR 1-18).

The Petitioners place great reliance on their garbled statements about the testimony of Dr. Raush. But, Petitioners do not enlighten the Court at all about the contents of Dr. Raush's written Pathology Report in the Hospital Records on his examination of the bodily tissue removed in the operation.

On the *microscopic* examination of this tissue, Dr. Raush reports that (Plaintiffs' Exhibit #6, TR 1-165-166):

> **"Both ovaries present with numerous corpora albicantical and occasional simple serious cysts. Both ovaries are partially encased in dense fibrous tissue that exhibits occasional lymphocytic infiltrates. One of the sections of ovarian tissue includes two cross sections of normal ureter in the adjacent dense fibrous tissue."**

Whereas, on the gross—naked eye—examination of the tissue (made before the microscopic examination), Dr. Raush was unable to identify any ureter at all. **What he thought was "fallopian tube" lost "in dense fibrous tissue that binds it securely to the upper portions of the ovary" was actually one to one and a half inch of ureter.** (Plaintiffs' Exhibit #6, TR 1-165, 166). Dr. Raush, the Pathologist, first recognized that the specimen contained one to one and a half inch of "ureter" instead of "fallopian tube" lost in dense fibrous tissue and bound to the ovary when he examined the specimen under the microscope. Of course, it is possible that Dr. Raush may have been mislead on the gross examination by the fact that the specimen was in a bottle marked ovaries and fallopian tubes.[1] But,

[1]There is a good deal of uncertainty of why the marking on the specimen bottle included the term "fallopian tubes" as well as "ovaries" (TR 1-167-187). Of course, this marking on the specimen bottle caused no damage to Mrs. Baird or anybody else. **The important point is that the Pathology Report shows this one to one and a half inch piece of ureter was lost in dense fibrous tissue which bound it to the ovary.**

he does not say so in his testimony. It is more than likely that the tissue was simply that difficult to identify with the naked eye because if its small size and the fact that it was lost in dense fibrous tissue and part of a dully gray-white mass (pp. 9-10 *infra*).

Testimony of Dr. Bohle.

Dr. Bohle was not a very positive witness but he was, indeed, a very truthful one. He admits that—more than two years after the operation on Mrs. Baird—he cannot remember the specific precautions he took to identify and attempt to avoid injury to Mrs. Baird's ureter but that his regular practice was to try to see and/or feel the ureter and, where apparently needed, try to dissect around it; that what looked like, and he thought was, entirely fibrous tissue actually included the one to one and a half inch of dissected ureter; that he did not think he was cutting the ureter but thought he was cutting ovarian tissue free from the adhesions and inflammatory tissue; that even, if all reasonable measures are taken to identify, and avoid injury to, the ureter, there still may be injury to the ureter under these circumstances and that he believes that, he acted in accordance with, rather than contrary to, standards of a physician specializing in gynecology in the operation for the removal of Mrs. Baird's ovaries (TR 1-209-223, TR 1-228, TR 2-65).

Testimony of Dr. Franks.

Dr. Franks testified that he had studied both the Lourdes and Western Baptist Hospital records on

Mrs. Baird and that, in his opinion, the injury to Mrs. Baird's ureter did not indicate that Dr. Bohle had performed improperly or negligently; that Dr. Bohle's treatment of Mrs. Baird was not in violation of acceptable medical standards; that the injury to the ureter was caused by Mrs. Baird's anatomy in that Mrs. Baird's ovaries were stuck to the pelvic wall; that in such a situation, the adhesions become "very sticky" "like putting in" "Super Glue" so that mobility of the organs become almost impossible and that in such a situation, the adhesions can so obscure the track of the ureter that it is not identifiable (TR 2-90 to 2-99).

Testimony of Dr. Housman.

Petitioners state that (Petition pp. 9-10):

"On his direct examination, Dr. Housman expressed the "opinion" that the severing of Mrs. Baird's ureter 'does not represent negligence on the part of Dr. Bohle or any physician' (Dr. Housman TR 2-122) and that 'in reviewing this chart and reviewing this case, I cannot find any real areas of deviation from acceptable medical standards (Dr. Housman TR 2-122).' "

"Despite the above broad language, Dr. Housman admitted that the sole basis for his 'opinion was his review of Dr. Bohle's operative note and the pathology report. (Dr. Housman TR 2-122).' "

The implication there is the Petitioners elicited this presumably dangerous admission on cross examination. However, this is not the case. In his direct testimony,

Dr. Housman simply pointed out that the Operative Note (Report of Operation) and the Pathology Report showed that "there were dense adhesions and scar tissue in the pelvis; that the ureter and ovary are "in very close relationship" to each other; that they were "scarred down with scar tissue" and that with Mrs. Baird's "particular pathology" injury to the ureter was one of the inherent risks of the surgery (TR 2-123).

Dr. Housman testified that he had reviewed both the Lourdes Hospital Records and also the Western Baptist Hospital records where the damage to Mrs. Baird's ureter was quite successfully repaired (TR 1-134-139). However, it is true that the Report of Operation and especially the Pathology Report alone were quite enough to entirely justify Dr. Housman's opinions.

Petitioners' Petition also states that (p. 11):

"Dr. Housman further stated that it was Dr. Bohle's decision to remove all of the tissue that he removed, as opposed to leaving a portion of the tissue, which caused the injury to Mrs. Baird's ureter" (Dr. Housman TR 2-141, 2-142).

But, in fact, Dr. Housman stated that it is "not correct" to say that "if a portion of the ovarian tissue had been left in", instead of removing all of it, "the ureter would not have been injured." (TR 2-140).

Testimony of Dr. Cook.

As stated in Petitioners' Petition, Dr. Cook testified that he did not find "any indication or evidence"

that Dr. Bohle violated acceptable standards of a physician specializing in gynecology (Petition, p. 10).

Dr. Cook based his testimony on his review of copies of the Hospital Records relating to the surgery performed by Dr. Bohle (at Lourdes Hospital), her Hospital Records on the surgery performed by Dr. Ransler (at Western Baptist Hospital) and a Memorandum on Material Facts furnished by Dr. Bohle's attorney (Cook Depo. pp. 17-22, Exhibits 1-3). Dr. Cook's opinion was that the injury to Mrs. Baird's ureter was because of "her circumstances and her pathology"—not any fault of the surgeon (Cook Depo. pp. 110-111).

The Petition states in Footnote 4 on Page 12 that Dr. Cook was totally ignorant of the trial testimony of Dr. Bohle and the pathologist, Dr. Raush, and that this fact should have disqualified Dr. Cook from expressing "opinions" as to whether Dr. Bohle was neglgent or had failed to comply with acceptable medical standards.

At most, Dr. Cook's lack of knowledge about the testimony of Drs. Bohle and Raush "might" affect the weight of his testimony. But, in fact and in truth, the testimony of Dr. Bohle and of Dr. Raush support Dr. Cook's opinions.

Dr. Bohle's testimony is summarized on page 5 *supra*. It is true that Dr. Bohle did not remember that he tried to see and/or feel the ureter. But, he also did not remember that he didn't try to see and/or feel the ureter. He does know, however, that his regular practice in an operation like this is to try to see

and/or feel the ureter. In any event, no matter how much he had tried to see and/or feel, he would have been unable to see or feel this small piece of ureter hidden in scar tissue and attached to the ovary.

Testimony of Dr. Raush.

Dr. Raush was the pathologist who examined the tissue removed in Dr. Bohle's operation on Mrs. Baird. It was Dr. Raush who found that Mrs. Baird's ureter had been cut.

Dr. Raush testified that on the gross—naked eye—examination, he found what he thought was fallopian tube; that what he thought was fallopian tube was obscure and buried in scar tissue; that later, he made his usual microscopic examination and under the microscope, he could tell that this was not fallopian tube tissue, but was ureter tissue; and that, in this microscopic examination, he found a cross section of ureteral tissue "made through a loop of ureter" with a total length of an inch to an inch and a half and with the surface of such segment of ureter involved in the inflammatory and scarring process on the side closest to the ovaries (TR 2-4, 12, 15, 17, 22-24).

Dr. Raush further testified that the ureter found in the specimen would be difficult to feel behind the peritoneum because the omentum (the apron) adhered over the surface of the ureter and, thereby the normal anatomic boundaries would have been obscured because of the thickness of the omentum (TR 2-17).

Dr. Raush also testified that this piece of ureter was attached to the ovary; that its cerotial surface was

incorporated in the gray-white fibrous tissue; that the ability to discern this material with the naked eye was hampered by the presence of scar tissue; that the normal wrinkling or shiny surface was not present and that this one to one and a half inch of ureter was a part of dully fibrous gray-white mass (TR 2-20, 21).

The Pathology Report stated that both ovaries are partially encased in dense fibrous tissue and Dr. Raush testified that means there is a scar formed in the tissue around the ovaries, surrounding the ovaries and obscuring the surface and the result of this was to, more or less, obliterate the ability to see the ovaries (TR 2-22).

Obviously, the testimony of Dr. Bohle and especially of Dr. Raush is highly supportive of the testimony of Dr. Cook as well as Drs. Franks and Housman.

ARGUMENT.

Lack of Reason for Granting Certiorari.

There is no good reason for granting certiorari in this case because Federal Rules of Evidence 702-705 are as clear as words can make them. Petitioners already have received one fair trial in this case and there is no reason that they should have another one.

The admission or exclusion of the opinions of expert witnesses under Rules 702-705 in the decided cases are based on differences in the evidence in such cases and not on uncertainty in the Rules. For this reason, the Trial Judge has considerable discretion in deciding whether testimony by a qualified expert should or

should not be received. This is as it should be because the Trial Judge has heard all of the evidence and seen most of the witnesses.

Most certainly, in the case at bar, the Hospital Records constitute ample basis for the opinions of the witnesses. In fact, these records are the best evidence. They were written before this case was hatched.

The Pathology Report alone constitutes sufficient, in fact conclusive, basis for the experts' opinions. This report is strong evidence that no matter what procedures Dr. Bohle had followed, this one to one and a half inch of ureter would have been transected. The fact that Dr. Bohle did not remember or write down the specific actions taken by him to protect the ureter does not change the fact that the one to one and a half inch of ureter transected was hidden in scar tissue and attached to the right ovary "encased in dense fibrous tissue" so that the removal of that right ovary would most likely have resulted in the injury to the right ureter no matter what procedures Dr. Bohle followed. Moreover, there is nothing whatever in Dr. Bohle's testimony which is in conflict with the Hospital Records. Instead, Dr. Bohle's testimony is supportive of the Hospital Records.

The Petitioners' Petition ridicules the Court of Appeals for its reference to pre-trial summaries of the case prepared by defense counsel and reviewed by expert witnesses for the defense (Petition p. 24). Yet, Petitioners' expert witnesses, Herman Brovender, relied on a summary prepared by plaintiff counsel. The

main difference in the pre-trial summary prepared by defense counsel and the pre-trial summary prepared by plaintiff counsel is that the summary prepared by defense counsel is a matter of record (Exhibit 3 to Cook Depo.); whereas, there is no evidence showing the contents of the summary relied upon by plaintiffs' witness Herman Brovender because the summary was not introduced in the Brovender deposition.

The transcript of evidence will show that there is substantial evidence in support of the statements made in defense counsel's summary; whereas, there is no way to show whether or not the summary relied on by Brovender has any support in the evidence or not. If there is anything incorrect about defense counsel's summary, plaintiff counsel had ample means of protecting plaintiffs' interest by bringing out such deficiencies in cross examination and testing the witnesses' opinions in the same manner as that used where the testimony is in answer to a hypothetical question.

Unquestionably, the defendants' expert witnesses had ample facts on which to base their opinions.

The Cases.

As heretofore stated, the admission or exclusion of the opinions of expert witnesses under Rules 702-705 in the decided cases are based on the differences in the evidence in such cases and not on uncertainty in the interpretation of the Rules. Also, at the appellate level, the discretion of the Trial Judge in deciding whether or not the testimony of a qualified expert

should or should not be admitted is an important factor.

It is submitted that there is no case cited in Petitioners' Petition which would justify a Federal Appellate Court in reversing the Trial Court's judgment because of its admission of the opinions of the expert witnesses who testified in the case at bar.

The only case quoted from by Petitioners' in their Petition (P. 35) is *Hicks* v. *United States,* 368 F. 2d 626 (4th Cir., 1966.). Presumably, Petitioners cite, and quote from, the case as authority that certiorari should be granted because of the use of the word "negligence" or "negligently" in their opinions by two of defendants' expert witnesses. In the first place, *Hicks* was decided before Rule 704 became a Rule of Evidence in the federal courts. In the second place, the word "negligently" used by Dr. Franks and the word "negligence" used by Dr. Housman were coupled with their testimony that there was no violation or deviation of acceptable medical standards by Dr. Bohle (cf. pp. 5-6 *supra*). In the third place, Petitioners did not object to such testimony on the ground that it was in violation of Rule 704 but, on the ground that there was not a proper basis for the testimony under Rule 703 (TR 2-90-92; TR 2-121-122). In the fourth place, the Trial Court fully explained in its instructions to the jury the relationship between negligence, ordinary care and the standards required of Dr. Bohle (TR 2-189-190).

Although the admission or exclusion of the expert's opinion primarily turns on the evidence and circumstances of each particular case, there is one thread of court made law which is enunciated in many of the cases to the effect that the Trial Judge has broad discretion in deciding whether testimony of a qualified expert should or should not be received.[2]

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[2]The only appellate cases cited in the body of Petitioners' Petition, with the exception of *Hicks*, are the three cases cited on page 32-33 of the Petition and each of these three cases refers to this principle in sustaining the Trial Court's refusal to admit the expert's opinion. *Ricciardi* v. *Children's Hosp. Medical Center*, 811 F. 2d 18 (1st Cir. 1987); *Viterbo* v. *Dow Chemical Co.*, 826 F. 2d 420 (5th Cir. 1987); *Dallas & Mavis Forwarding Co.* v. *Stegall*, 659 F. 2d 721 (6th Cir. 1981). Respondents do not consider any resort to the "discretion" principle is needed at all for sustaining the admission of the expert's opinions in the case at bar. Naturally, however, this principle is equally applicable where the Trial Court has admitted an expert's opinion. *Coleman* v. *De Minico*, 730 F. 2d 42 (1st Cir. 1984). See also *Polk* v. *Ford Motor Co.*, 529 F. 2d 259 (8th Cir.) cert. denied. 426 U.S. 907 (1976), cited as the lead case in footnote 9 on page 27 of Petitioners' Petition.

CONCLUSION

Respondents submit that the admissibility of the testimony of the opinions of Defendants' experts was quite appropriate and proper under the facts and evidence presented in this case. Respondents respectfully request that the Petitioners' Petition for Writ of Certiorari be denied.

Respectfully submitted,

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